February 10, 2006

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Nick Piepmeier

Date of Filing: January 3, 2006

Case Number: TFA-0140

On January 3, 2006, Nick Piepmeier filed an appeal from a determination issued to him on November 30, 2005 by the Department of Energy's (DOE) Golden Field Office (GO). In that determination, GO responded to a request for documents that Mr. Piepmeier submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. GO identified several documents responsive to Mr. Piepmeier's request. Some of those documents were released in their entirety, others were released with some deletions, and others were withheld in their entirety pursuant to Exemptions 5 and 6 of the FOIA. This appeal, if granted, would require GO to release the withheld information to Mr. Piepmeier.

I. Background

Mr. Piepmeier requested several records regarding his deceased father, a former DOE employee. Specifically, Mr. Piepmeier requested "documents relating to James M. Piepmeier's work, time logs, and medical/mental conditions during his posting to Baghdad January-February 2004 and subsequent return home," *See* Fax Submission from Mr. Piepmeier to Anna Martinez-Barnish, GO (August 7, 2005). On November 30, 2005, GO issued a determination in response to Mr. Piepmeier's request. *See* Letter from GO to Mr. Piepmeier (November 30, 2005) (Determination Letter). GO identified several documents responsive to Mr. Piepmeier's request. Of those responsive documents, 14 pages were released in their entirety, 60 pages were partially withheld pursuant to Exemption 6, and 112 pages were withheld in their entirety pursuant to Exemption 5. Determination Letter at 2. GO stated that the information withheld under Exemption 6 consisted of "individual names listed in the documents who are not key personnel." Determination Letter at 1. GO added that the documents withheld under Exemption 5 were "documents containing legal advice and decision-making regarding Mr. [James] Piepmeier's Federal employment." *Id.* at 2.

Mr. Piepmeier filed the present appeal on January 3, 2006. Letter from Mr. Piepmeier to OHA (December 28, 2005) (Appeal). In his appeal, Mr. Piepmeier argues that he is entitled to all records pertaining to his father.[1]

II. Analysis

Exemption 5

Exemption 5 of the FOIA exempts from mandatory disclosure documents that are "inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). Exemption 5 permits withholding of responsive material that reflects advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated under the deliberative process privilege. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). In order to be shielded by this privilege, a record must be both predecisional, i.e. generated before the adoption of agency policy, and deliberative, i.e. reflecting the give-and-take of the consultative process. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 856 (D.C. Cir. 1980). This privilege covers records that reflect the personal opinion of the writer rather than final agency policy. *Id*. Consequently, the privilege does not generally protect records containing purely factual matters.

Predecisional materials are not exempt merely because they are prepared prior to a final agency action, policy, or interpretation. These materials must be a part of the agency's deliberative process by which decisions are made. *Vaughn v. Rosen*, 523 F.2d 1136, 1144 (D.C. Cir. 1975). The deliberative process privilege is intended to promote frank and independent discussion among those responsible for making governmental decisions. *EPA v. Mink*, 410 U.S. 73, 87 (1973); *Kaiser Aluminum & Chemical Corp. v. United States*, 157 F. Supp. 939 (Ct. Cl. 1958).

The documents in question are various emails and correspondence among Human Resources personnel, supervisors, and legal counsel regarding the decision whether to terminate an employee. They contain, *inter alia*, opinions and concerns raised by various parties in meetings, discussions of decision-making procedures, and recommendations. After reviewing the

[1] The appeal contains two additional arguments. First, Mr. Piepmeier argues that there was a delay in GO's processing of his initial FOIA request. He appears to make this argument to mitigate the fact that his appeal was filed with OHA after the statutory deadline for filing lapsed. However, since OHA considers this appeal timely filed, we need not address the timeliness of GO's response. Second, Mr. Piepmeier argued that he did not understand why any part of his request was denied since he had been told that he was entitled under the Privacy Act to all records involving his deceased father. This assertion is incorrect. Privacy Act rights are personal to the individual who is the subject of the records and cannot be asserted derivatively by others. *See Shulman v. Sec'y of HHS*, No. 94 Civ. 5506, 1997 WL 68554, at **1, 3 (S.D.N.Y. Feb. 19, 1997) (Plaintiff had no standing to assert any right that might have belonged to former spouse), *aff'd*, No. 96-6140 (2d Cir. Sept. 3, 1997); *Sirmans v. Caldera*, 27 F. Supp. 2d 248, 250 (D.D.C. 1998) (plaintiffs may not object to Army's failure to correct records of other officers). Neither deceased individuals nor their executors or next-of-kin enjoy any rights under the Privacy Act. *Crumpton v. U.S.*, 843 F. Supp. 751, 756 (D.D.C. 1994) (Widow of deceased Army officer had no rights under Privacy Act because officer was dead and records were contained within systems of records retrievable by name of deceased officer or by some identifying number, symbol or other data assigned to the officer alone); *Monk v. Teeter*, 1992 WL 1681, at *2 (9th Cir. Jan. 8, 1992) ("The right to privacy does not survive one's death.").

documents, we find that they are predecisional and contain material that reflects DOE's deliberative process and are, therefore, exempt from disclosure under Exemption 5 of the FOIA.

The fact that requested information falls within a statutory exemption does not necessarily preclude release of the material to the requester. The DOE regulations implementing the FOIA provide that "to the extent permitted by other laws, the DOE will make records available which it is authorized to withhold under 5 U.S.C. § 552 whenever it determines that such disclosure is in the public interest." 10 C.F.R. § 1004.1. In this case, we do not believe the release of the predecisional information, consisting primarily of opinions and recommendations regarding the employment status of one individual, would be in the public interest. Furthermore, release of such information could have a chilling effect on the agency's ability to obtain straightforward opinions and recommendations in the future.

Exemption 6

Exemption 6 of the FOIA protects from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Department of State v. Washington Post Co*., 456 U.S. 595, 599 (1982).

In order to determine whether a document may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine whether a significant privacy interest would be compromised by the disclosure of the record. If no privacy interest is identified, the document may not be withheld pursuant to Exemption 6. *Ripskis v. Department of Hous. and Urban Dev*., 746 F.2d 1, 3 (D.C. Cir. 1984). Second, the agency must determine whether release of the document would further the public interest by shedding light on the operations and activities of the Government. *See Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 773 (1989). Third, the agency must balance the identified privacy interests against the public interest in order to determine whether release of the document would constitute a clearly unwarranted invasion of personal privacy under Exemption 6. *See generally Ripskis*, 746 F.2d at 3.

In this case, GO found that release of the withheld information would result in the invasion of personal privacy interests in that the release of the information would disclose the identity of certain individuals. Releasing the names of the individuals, subordinates who were sharing their opinions or concerns with or making recommendations to their superiors, could allow a third party to connect the individual with a particular opinion or action raised or undertaken in conjunction with their work. This could, in turn, lead to those individuals being intimidated, harassed, or otherwise unable to perform their duties.

Having identified a privacy interest in the withheld information, it is necessary to determine whether there is a public interest in the disclosure of the information. Information falls within the public interest if it contributes significantly to the public's understanding of the operations or activities of the government. *See Reporters Committee*, 489 U.S. at 775. Therefore, unless the

public would learn something directly about the workings of government from the release of a document, its disclosure is not "affected with the public interest." *Id*.; *see also National Ass'n of Retired Employees v. Horner*, 879 F.2d 873, 879 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1078 (1990).

Upon reviewing the documents in question, we find that there is little, if anything, the public would learn about the workings of the government from the release of the withheld names and identifying information. Consequently, the public interest in such information is minimal at best. Therefore, after weighing the identified privacy interests present in this case against a minimal or even non-existent public interest, we find that release of information revealing the identities of federal employees could reasonably be expected to constitute an unwarranted invasion of personal privacy.

The FOIA also requires that "any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b); see *Greg Long*, 25 DOE ¶ 80,129 (1995). We find that GO complied with the FOIA by releasing to Mr. Piepmeier all factual, non-deliberative portions of the documents.

III. Conclusion

For the reasons stated above, we have determined that GO properly applied Exemptions 5 and 6 of the FOIA in releasing information to Mr. Piepmeier. Therefore, Mr. Piepmeier's appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed on January 3, 2006, by Nick Piepmeier, OHA Case No. TFA-0140, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: February 10, 2006